

to which positions require religious knowledge, training or expertise may not be subjected to second-guessing by a government agency. Such scrutiny unconstitutionally chills the Church's rights under the First Amendment and is inconsistent with national policy as enunciated by Congress.

144. It should be noted that the FCC, in apparent recognition of the important programming and non-programming roles played by religious institutions in communities all over America, has been licensing religious institutions, including the Church, for many decades. However, the FCC has provided little guidance regarding the EEO programs of religious licensees -- guidance that has become more imperative with the issuance of the Amos decision. Even prior to Amos, religious broadcasters had long requested the Commission to issue specific guidelines for religious stations. See National Religious Broadcasters, Inc., 43 F.C.C.2d 451 (1973) (letter seeking ruling as to applicability of King's Garden to various positions); King's Garden, Inc., 38 F.C.C.2d 339, 339 (1972) (petition for rule making). The Commission, however, deferred action on the National Religious Broadcasters' request, preferring a case-by-case approach to developing EEO standards for religious broadcasters. National Religious Broadcasters, 43 F.C.C.2d at 452. The Commission dismissed the request by King's Garden as moot. Letter from Chief, Broadcast Bureau to King's Garden, Inc. (October 5, 1976). Having chosen this approach, the Commission should apply any standards established in this proceeding prospectively only and not judge the Church's performance during the License Term under

such newly-developed standards. Greene v. United States, 376 U.S. 149 (1964).

145. The Church is asking that the Commission acknowledge the validity of an EEO program which was significantly comprised of requests for applicant referrals from Lutheran Church organizations and KFUD employees, and advertisements in Lutheran publications. It would be nonsensical to demand that a church use secular sources in its recruitment where Congress has stated that it is free to hire only employees of its religion.<sup>45/</sup>

146. While a different question might be posed if there were no minority members or clergy in the Lutheran Church-Missouri Synod, that is not the case. There are significant and growing numbers of minorities in the Church. More to the point, these minorities are not in the Church by accident. The Church has long sought to achieve greater minority participation in the Church and those efforts are paying off. While the Church has worked for over a century with the African-American community, the creation of the African-American Mission Models Task Force in 1975 and the Commission on Black Ministry in 1976 paved the way for the current growth in minority presence in the Church. Because of these efforts, a number of Church organizations were created that are well suited to assisting KFUD with its

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<sup>45/</sup> The resort by a religious entity to its own publications or other affiliated sources for the recruitment of minority and female employees has never been found to be improper. In fact, under the federal scheme relating to tax exemptions, such manner of publication is not only proper, but completely adequate to demonstrate the nondiscriminatory policy of the religious organization. See, e.g., Rev. Proc. 75-50, 1975-2 CB 587.

affirmative action needs. Among those used by KFUD was the Lutheran Employment Project, a minority employment clearinghouse operated by various Lutheran churches.

147. Given these resources, as well as the success the Stations had in obtaining minority referrals from Station minority and non-minority employees in the first half of the License Term, the affirmative action program at KFUD was substantial, if somewhat uneven. It should be remembered that the Church has never disputed the importance or necessity of the Commission's EEO goals, and has sought only to find a way to further them in a religious context consistent with constitutional and congressional policy. Given the lack of Commission guidance and the obvious conflicts demonstrated in the King's Garden and Amos cases, the Church should not be faulted if it has, in good faith, struck the balance differently than the Commission would have had it previously addressed the issue. At the very least, the Church asks the Presiding Judge to take the unsettled nature of the law and the religious protections of the First Amendment into account in determining both the adequacy of the Stations' EEO program and any possible sanctions associated therewith.

2. **Even If First Amendment Matters Were Not at Issue, and KFUD(AM)/KFUD-FM Were to Be Analyzed Under the Commission's Traditional EEO Standards, the Commission Is Required to Analyze the Conduct at Issue Based on the Legal Standards That Existed During the Relevant Time Period**

148. In addition to the difficulty of determining the appropriate legal standard to apply from a constitutional and congressional policy perspective, the Presiding Judge is also faced with the complications caused by the significant amount of time that has passed since the activity being reviewed occurred. The License Term at issue began over eleven years ago and ended four and one-half years ago. While the passage of time alone has made it difficult to determine many of the relevant facts, the continuing evolution of the Commission's EEO policy both during and after the License Term places the Presiding Judge in the even more difficult position of trying to reconstruct the appropriate historical standard by which to judge the affirmative action efforts of the Stations. Given the vastly different standards utilized by the Commission in 1983 (when the License Term began), 1989 (when the renewal applications were filed), and 1994 (when the HDO was issued), this is no easy task.

149. At the very beginning of the License Term, the standard being used by the Commission for processing renewal applications was result-oriented. See EEO Processing Guidelines for Broadcast Renewal Applicants, 46 R.R.2d 1693, recon. denied, 79 F.C.C.2d 922 (1980). Broadcasters were free to craft their own approach to affirmative action as long as they could demonstrate that minority hires resulted. Id.

150. In 1987, the Commission began to place a heavy emphasis on recruitment efforts, documentation, and formalized EEO programs. See Equal Opportunity Rules for Broadcasters, 2 FCC Rcd 3967 (1987). The Commission amended its EEO Rule to incorporate its recruitment guidelines that had previously appeared only in the Commission's Model EEO Program Report (Form 396). Id. at 3968-69. As noted above, in addition to prodding licensees to conform their EEO programs to the Commission's "model" program, the Commission began to place a heavy emphasis on documentation of every aspect of a licensee's EEO and hiring efforts.

151. This emphasis on documentation was most apparent in the Commission's new two-step approach for processing renewal applications. Under that approach, the Commission's staff was to examine the EEO information submitted with the renewal application to determine whether the licensee had complied with the EEO Rule. If the staff was unable to make that determination, an investigation was to be initiated. Id. at 3974. The standard letter of investigation, which, in the case of KFUD, can be found in the Mass Media Bureau's Exhibit 4, demands extensive information for which most licensees had not kept records prior to the Commission's action in 1987.<sup>46/</sup> Once

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<sup>46/</sup> See, e.g., D.W.S., Inc., 7 FCC Rcd 7170, 7173-74 (1992); Double L Broadcasting of Lansing Limited Partnership, 7 FCC Rcd 6435, 6439-40 (1992); Liggett Broadcast, Inc., 7 FCC Rcd 4520, 4521-22 (1992); Lanser Broadcasting Corp., 7 FCC Rcd 4254, 4258, 4258-59 (1992); Application of Group Six Communications, Inc., 7 FCC Rcd 1815, 1816 (1992), recon. denied, 8 FCC Rcd 3111 (1993); Applications of Certain

(continued...)

again, the standard against which licensees would be measured had changed.

152. Also in a state of transition were the penalties licensees could expect to receive for not meeting the Commission's increasingly stringent expectations for station EEO programs. Until 1988, sanctions for an inadequate EEO program were largely limited to reporting conditions or submission of a revised EEO program aimed at ensuring prospective compliance, rather than punishing licensees for prior noncompliance. In 1988, the Commission issued what appears to have been the first monetary forfeiture for noncompliance with the EEO Rule.<sup>47/</sup>

153. Even after the License Term ended on February 1, 1990, the Commission continued to narrow its definition of acceptable EEO practices. The Commission's increasingly constricted view of what qualifies as an adequate EEO program ultimately culminated in the February 1, 1994 EEO Policy Statement. See Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929 (1994) ("EEO Policy Statement"). The EEO Policy Statement, which was released on the same day as the HDO in this proceeding, appears to have served as the processing guideline

<sup>46/</sup> (...continued)

Broadcast Stations Serving Communities in the State of Louisiana, 7 FCC Rcd 1503, 1508 (1992), recon. denied, 8 FCC Rcd 3239 (1993); Lewis Broadcasting Corporation, 7 FCC Rcd 1420, 1421, 1422 (1992); Applications of Century Chicago Broadcasting, Ltd., 6 FCC Rcd 7246, 7247 (1991); Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio, 3 FCC Rcd 6944, 6948 (1988).

<sup>47/</sup> See Kansas City Youth for Christ, Inc., 3 FCC Rcd 6866 (1988).

utilized by the Commission in designating the KFUE renewal applications for hearing.

154. By designating this hearing four years after the end of the License Term and more than eleven years after the relevant factual period began, the Commission has placed both the Presiding Judge and the Church in the difficult position of reconstructing not only the well-aged facts of this case, but also the appropriate historical legal context in which to view them. This effort is essential since the Commission would otherwise be impermissibly applying new standards to past conduct. Thus, for example, it would be inappropriate to fault the Church for not meeting, during the 1983-1987 portion of the License Term, the EEO standards set by the Commission in 1987. Similarly, the standards set by the Commission in its 1994 EEO Policy Statement should have no bearing on this case since they did not even come into being until four years after the Stations' License Term ended. To find otherwise would allow the Commission to unfairly penalize licensees merely by delaying action on a licensee's renewal application until new compliance standards and sanctions were adopted. See United States v. Louisiana-Pacific Corp., 682 F. Supp. 1141, 1163 (D. Colo. 1988) ("Delay on the part of the government in bringing the enforcement action should neither increase nor decrease the penalty amount.").

a. **The Compliance Standards and Sanctions Set Forth in the 1994 EEO Policy Statement Are Not Applicable in Determining the Adequacy of KFUD's EEO Program During the 1983-1990 License Term**

155. Although the Commission appears to have relied on its 1994 EEO Policy Statement in the HDO, the compliance standards set forth in the EEO Policy Statement, as well as the significantly increased sanctions contained therein, cannot be applied to this case. As discussed below, the EEO Policy Statement fails to meet the requirements of the Administrative Procedure Act, 5 U.S.C. § 101 et seq. (1977 and Supp. 1994) and is therefore without force. Even if that were not the case, however, its application to KFUD would be improper, since the standards set forth in the EEO Policy Statement make no provision for accommodating even the King's Garden exception to the EEO Rule, much less the religious exemption addressed in the Amos decision. Moreover, application of the EEO Policy Statement to KFUD's 1983-1990 License Term would constitute an improper retroactive application of those standards and sanctions, and would violate the requirement set forth in Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965), that similarly situated applicants be treated similarly.



(i) The 1994 EEO Policy Statement Violates the Administrative Procedure Act and Is Therefore Without Force

156. Prior to its adoption of the 1994 EEO Policy Statement, the Commission adopted a similar policy statement establishing standardized forfeitures for violations of a variety of Commission rules. See Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992), revised, 8 FCC Rcd 6215 (1993), vacated sub nom. United States Tel. Ass'n v. FCC, No. 93-1321 (D.C. Cir. July 12, 1994). In the original version of that Statement in 1991, the Commission established a standardized forfeiture of \$12,500 for "Violation of broadcast EEO rules" and listed a number of generalized factors that could increase or decrease the forfeiture by up to 90%. Standards for Assessing Forfeitures, 6 FCC Rcd at 4698, 4700. For example, if a rule violation was deemed intentional, the standard fine would be increased by 50-90%, but if the licensee was found to have a history of overall compliance, the fine would be reduced by 20-50%. Id. at 4700.

157. Two years later, in 1993, the Commission revised its Standards for Assessing Forfeitures, by, among other things, deleting the EEO Rule Violation category. See Standards for Assessing Forfeitures, 8 FCC Rcd 6215, 6215 n.1 (1993). In revising its schedule of forfeitures, the Commission noted in a footnote that it intended to issue a separate policy statement establishing standardized forfeitures for EEO Rule violations. Id. The Commission eventually issued that statement in Standards

for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929 (1994), the EEO Policy Statement which was released on the same day as the KFUD HDO and which was discussed above. The EEO Policy Statement, like the earlier Standards for Assessing Forfeitures, was adopted without public notice or an opportunity for comment.

158. In July of 1994, the U.S. Court of Appeals for the District of Columbia Circuit set aside the Standards for Assessing Forfeitures guidelines, finding that the document was far more than just a policy statement and that the Administrative Procedure Act therefore required that it be the subject of notice and comment before it could be issued legally. United States Tel. Ass'n v. FCC, No. 92-1321 (D.C. Cir. July 12, 1994) at 9.

159. The EEO Policy Statement is even more substantive than the Standards for Assessing Forfeitures guidelines, since it not only sets the appropriate forfeitures for various violations, but also establishes very precise standards as to what constitutes a violation in the first place. Given that the EEO Policy Statement was also issued without notice and comment, it is clearly an invalid effort at rulemaking that violates the Administrative Procedure Act. United States Tel. Ass'n v. FCC, No. 92-1321 (D.C. Cir. July 12, 1994) at 9. It is, as a result, without any force and cannot be used in appraising the adequacy of KFUD's EEO program nor in establishing sanctions for any shortcomings that might be found to have existed in that program.

(ii) Even If the EEO Policy Statement Were Not Invalid as a Matter of Law, It Would Be Inappropriate to Apply It to KFUD's 1983-1990 License Term

160. Perhaps because the Commission did not have the benefit of public comment in drafting the EEO Policy Statement, that document fails to address a number of important issues relevant to the equitable application of the Commission's EEO Rule. The most relevant omission in the present case is that the numerical calculations established by the EEO Policy Statement for determining the base forfeiture and any upward or downward adjustments do not take into account the different standards that must be applied to religious stations under the King's Garden decision, much less the more recent and expansive Amos decision. If the strict numerical calculations that form the basis of the EEO Policy Statement were applied to a religious station, it would indicate EEO violations where none exist. Worse, by failing to acknowledge the exemption for religious employment positions, the EEO Policy Statement is constitutionally suspect. The EEO Policy Statement is therefore inapplicable to the case of KFUD even if it were otherwise a valid regulation.

161. Moreover, as discussed briefly above, applying the EEO Policy Statement to KFUD's 1983-1990 EEO program would improperly apply new standards to past conduct.<sup>48/</sup> It has long been the

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<sup>48/</sup> The United States Supreme Court has made clear that agencies may not generally adopt rules with retroactive effect unless Congress has made a specific grant of retroactive rulemaking authority. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988). As the U.S. Court of Appeals for the D.C. Circuit made clear in United States Tel. Ass'n v. FCC, No. 92-1321 (continued...)

law that actions should be judged by the law in effect at the time the actions in question took place. Greene v. United States, 376 U.S. 149 (1964).

162. The Commission itself has previously acknowledged the fundamental unfairness of applying new EEO standards to past conduct. For example, in reviewing the license renewal applications of stations licensed in the Charlotte, North Carolina market, the Commission stated that "we believe that it would be prejudicial at this time to apply such [modified EEO] standards to Charlotte licensees without any prior notice, especially since other North Carolina licensees were processed under the Commission's existing criteria." Inquiry Into the Employment Practices of Stations Licensed to the Charlotte, North Carolina Market, 45 R.R.2d 543, 545 (1979). See also Arkansas Educ. Television Comm'n, 5 FCC Rcd 2745, 2746 (1990), modified in other respects, 6 FCC Rcd 478 (1991) (Commission defers initiation of EEO reporting conditions for one year so as to allow licensee time to come into compliance with "recent revisions of the EEO rule."); CBS, Inc., 88 F.C.C.2d 649, 666-67 (1981) (license renewal application covering 1971 to 1974 time period will not be found deficient for failure to meet 1977 processing guidelines). Application of the 1994 EEO Policy

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<sup>48/</sup>(...continued)

(D.C. Cir. July 12, 1994), a document which establishes a comprehensive schedule of fines is a substantive rule and that reality cannot be avoided merely by labelling the document a "policy statement."

Statement to KFUD in this proceeding would violate that well-established principle of fairness.

163. Finally, as is alluded to by the above-quoted language from Inquiry Into the Employment Practices of Stations Licensed to the Charlotte, North Carolina Market, 45 R.R.2d at 545, application of the EEO Policy Statement to KFUD would violate the principle stated by the Court of Appeals for the D.C. Circuit in Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965), that similarly situated applicants be treated similarly. When the rest of the Missouri broadcast licensees filed their renewal applications in late 1989, the Commission processed those applications pursuant to the EEO standards of that time. To apply a new and different standard to KFUD merely because the Commission delayed action on the KFUD license renewal applications would be both improper and unfair. This being the case, Melody Music, Inc. v. FCC requires that the 1994 EEO Policy Statement not be applied in the analysis of KFUD's EEO program in this proceeding.

**b. In Order to Examine the Adequacy of KFUD's EEO Program and the Appropriate Sanction for Any Shortcomings That Might Be Found, the Presiding Judge Must Look to Prior Case Precedent**

164. Given the ambiguity of the EEO Rule itself, particularly prior to the 1987 amendment adding portions of the Commission's Model EEO Program (Form 396) to the rule,<sup>49/</sup> the

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<sup>49/</sup> See Equal Opportunity Rules for Broadcasters, 2 FCC Rcd 3967 (1987).

best source of information as to what was considered an adequate EEO program in 1983-1990 and the appropriate sanction for any shortcomings is found in Commission EEO decisions from that general time period. This point has long been recognized by the Commission, which, prior to the invalid issuance of the EEO Policy Statement, had determined EEO compliance and sanctions in almost every EEO case by comparing the particular licensee's conduct to the conduct of licensees in prior decisions.<sup>50/</sup> Thus, almost every EEO decision of the Commission contains language like that in D.W.S., Inc., 7 FCC Rcd 7170 (1992), which stated with regard to that particular licensee:

The record of the instant case is similar to that of WRGI(FM) in Letter to Allan W. Roberts, President, All Communications of Naples, Florida, 4 FCC Rcd 3463 (1989). In that case, we found that the licensee failed to contact sources likely to refer minorities, failed to expand its list of unproductive sources until three months prior to filing its renewal application and did not keep adequate records of its EEO efforts necessary for meaningful self-assessment of its EEO program. The licensee also had the station for approximately two years. Accordingly, we imposed reporting conditions.

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<sup>50/</sup> See, e.g., Goodrich Broadcasting, Inc., 7 FCC Rcd 6655, 6657, 6658 (1992); Radio Seaway, Inc., 7 FCC Rcd 5965, 5968, 5969 (1992); Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area, 5 FCC Rcd 6738, 6739, 6741 (1990), recon. denied, 7 FCC Rcd 6045 (1992), 8 FCC Rcd 4223 (1993), appeal pending, No. 92-1546 (D.C. Cir.); Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893, 4895, 4895-96, 4897, 4898 (1990), recon. denied, 8 FCC Rcd 398, 8 FCC Rcd 603 (1992), 8 FCC Rcd 3933 (1993); Applications of Certain Broadcast Stations Serving Communities in the State of Texas, 4 FCC Rcd 6685, 6686, 6687 (1989).

Similarly, the licensee in the instant case failed to contact sources likely to refer minorities or expand its list of unproductive recruitment sources until two months prior to filing its renewal application. It also did not keep adequate records of its EEO efforts necessary for meaningful self-assessment. At the same time, the licensee did hire minorities, albeit late in the term, and consistently employed a significant number of minorities throughout the license term. Therefore, we grant renewal subject to reporting conditions to monitor future performance.

Id. at 7173.

165. It is therefore most appropriate to compare the EEO program of KFUO to the programs discussed in Commission decisions during the 1983-1990 License Term and shortly thereafter.<sup>51/</sup> Such an examination will reveal that KFUO substantially complied with the Commission's EEO Rule, and that any shortcomings merit, at most, the imposition of reporting conditions.

**3. The Stations' EEO Program Constituted Substantial Compliance With the Commission's EEO Rule and Merits, at Most, the Imposition of Reporting Conditions**

166. As the Proposed Findings of Fact demonstrate, the KFUO EEO program during the License Term was substantial, particularly when compared with the programs of other stations during that time period. While the Stations averaged a total of nineteen full-time employees on the staff, there were a total of 43 full-

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<sup>51/</sup> The one limitation to keep in mind in reviewing prior cases is that there are few, if any, which involve religious entities as licensees. Thus, it is necessary to first find EEO cases which are otherwise factually similar to this case, and then factor in, at a minimum, the King's Garden exemption for religious employment positions in determining the adequacy of the KFUO EEO program.

time hires over the course of the License Term. Referrals were sought for at least 26 of these hires, or over 60%.<sup>52/</sup> Because this number includes only job openings for which referral requests could be confirmed, and given the difficulty of locating such information for job openings from a decade ago, the real number of positions for which referrals were sought is probably higher. Moreover, a number of the job openings for which referrals were not sought involved clearly theological positions that are exempt under even the most narrow reading of the King's Garden exception.<sup>53/</sup>

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<sup>52/</sup> This includes seeking referrals from station employees, which is a permissible referral source. See 47 C.F.R. § 73.2080(c)(2)(iv).

<sup>53/</sup> On a related issue, the HDO appears to question the propriety of KFUD paying students at Concordia Seminary for working at the Stations part-time while being trained in the use of radio in the Church's mission and ministry, apparently feeling that any form of payment turns the training position into a job opening for which recruitment from sources outside the Church should have been pursued. Such a position raises serious constitutional questions about government interference with the Church's freedom to train its clergy in modern forms of ministry. It would make no sense to create a training opportunity for Lutheran seminary students in the use of radio for the ministry and then make those students compete for the relatively few ministry training opportunities with individuals who are neither Lutheran nor in training for the ministry. Moreover, because Concordia Seminary does have minority seminary students (although a smaller percentage than St. Louis as a whole), minorities are not precluded from these positions.

At any rate, from a pragmatic standpoint, there was little if any diminution of the Stations' EEO program caused by the seminary student program. As the Commission noted earlier this year, "[t]he Commission's primary EEO enforcement policies focus on minorities and women employed on a full-time basis." Implementation of Commission's Equal Employment Opportunity Rules, Notice of Inquiry, 9 FCC Rcd (continued...)



167. That KFUE's EEO program met with a fair degree of

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<sup>53/</sup>(...continued)

2047, 2050 (1994). As a result, the Commission has suggested eliminating all record keeping requirements for part-time hires. Id. In the case of the Concordia Seminary employees, almost all of the positions were part-time in the extreme -- 6 to 12 hours per week -- for little pay. (Church Ex. 4, pp. 4, 23). It is highly questionable whether anyone but Concordia students would even want such a "job." Moreover, even without the religion consideration, the Commission has generally recognized that certain hiring situations may reasonably preclude outside recruitment and it is for this reason that even in its restrictive 1994 EEO Policy Statement, the Commission indicated that a licensee could fail to seek referrals for as much as 33% of job openings without incurring any sanction. See Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, 9 FCC Rcd 929, 933 (1994).

Finally, the Church notes that the Commission has previously considered the EEO programs of a number of licensees that are affiliated with a school and that either utilize their station to train students or utilize the school as a favored source for station hiring, and not once in these decisions has the Commission ever even questioned the propriety of such an arrangement. See Seattle Public Schools, 4 FCC Rcd 625, 632 (Rev. Bd. 1989) (Review Board reverses ALJ who granted credit to incumbent in a comparative renewal case for using licensed facility to train students, but states that "[n]one of this -- we are at pains to emphasize -- is to be read to imply that the use of a noncommercial broadcast station as a vocational classroom is discouraged by the Commission, which is well and contentedly aware of such utilization by many educational institutions holding FM broadcast licenses.") (emphasis in original; citing Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations, 69 F.C.C.2d 200, 252 (1978)); see also Catawba Valley Broadcasting Co., 3 FCC Rcd 1913, 1916 (1988) (no question raised where University of North Carolina Center for Public Television utilized at its television station a student work-study program with the University of North Carolina and also hired communications students from several colleges and universities, despite the fact that only 13.3% of the student employees were minorities compared to 23.7% minority presence in the local labor force); University of North Carolina at Chapel Hill, 79 F.C.C.2d 248, 255 (1980) (citing with approval as a referral source "training programs including a part-time apprentice program for under-graduates majoring in 'journalism of all forms'").

success also cannot be denied. Of the 43 hires mentioned above, seven were minority hires. This means that 16.3% of full-time hires over the License Term were minority. Given that the St. Louis Metropolitan Statistical Area was 15.6% minority, see HDO, 9 FCC Rcd at 917, KFUE hired at 104.5% of parity during the License Term. Such a hiring record is hardly indicative of an inadequate EEO program, and is particularly useful for demonstrating compliance with the EEO Rule during the 1983-87 portion of the License Term when the Commission was utilizing a "result-oriented" approach to analyzing EEO programs.

168. As is also discussed in the Proposed Findings of Fact, after the Commission announced in 1987 its emphasis on outside referral sources that had previously only been mentioned in the Commission's Model EEO Program, KFUE began to enlarge its recruitment sources to more regularly include Broadcasting and the St. Louis Post Dispatch, and to use minority specific sources such as the Lutheran Employment Project of St. Louis, the Lutheran North St. Louis Outreach, the St. Louis American, and the St. Louis Sentinel. Moreover, as is demonstrated by Tom Lauher's memoranda of March 9, 1989 and March 15, 1989, the Stations made efforts to evaluate their EEO efforts and to make appropriate adjustments. (See Church Ex. 7, Att. 5; Church Ex. 4, Att. 11).

169. It takes only a cursory review of EEO decisions from the License Term and shortly thereafter to recognize that the KFUE EEO program, though not flawless, substantially complied with the EEO Rule. Even without taking into account the

exemptions for religious entities, KFUD compares quite favorably with numerous cases where licensees were found to be in substantial compliance with the EEO Rule, but reporting conditions were imposed or the filing of a revised EEO program was required to ensure prospective compliance. See, e.g., United Communications Corp., 54 R.R.2d 22 (1983) (AM license renewed without reporting conditions but licensee asked to file a revised EEO program where no minorities were employed or hired during the License Term and licensee failed to seek referrals from any minority sources); Auburn Broadcasting Co., 57 R.R.2d 1427 (1985) (AM and FM station licenses renewed with reporting conditions where licensee failed to contact minority referral sources or to hire minorities in parity with the local labor force, but had hired some minority employees during the license term); National Capital Christian Broadcasting, Inc., 3 FCC Rcd 1919 (1988) (television license renewed with reporting conditions where licensee made few, if any, efforts to contact minority referral sources, failed to monitor the results of its EEO program, omitted information from two sections of the EEO program filed with the FCC, but hired two minorities out of eighteen hires during the last twelve months of the license term); Letter to Allan W. Roberts, 4 FCC Rcd 3463 (1989) (FM license renewed with reporting conditions where licensee had contacted a minority referral source only once during its ownership of the station without mentioning any specific job opening, failed to maintain any records to allow evaluation of the program, and had no minorities on the station's staff); Applications of Certain

Broadcast Stations Serving Communities in the State of Texas, 4 FCC Rcd 6685, 6687 (1989) (television license renewed with reporting conditions where licensee only contacted a single minority referral source in the last year of the license term and failed to evaluate its EEO program until the end of the license term, but hired two minority employees out of seventeen hires during the last two years of the license term); Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893, 4895 (1990) (FM license renewed with reporting conditions where licensee made no specific efforts to recruit minorities during the license term, did not evaluate the effectiveness of its EEO program, and hired no African-Americans, the dominant minority in the labor force, for any of the 32 openings during the last two years of the License Term); Winfas, Inc., 5 FCC Rcd 4902, 4902-03 (1990), recon. denied, 8 FCC Rcd 3897 (1993) (where FM licensee argued that station's country and western format made it difficult to attract minority applicants, license renewed with reporting conditions where licensee used no minority referral sources prior to the filing of its renewal application, interviewed only seven minorities for 31 openings over a three year period, and failed to evaluate its EEO program); Application for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area, 5 FCC Rcd 6738, 6739 (1990), recon. denied, 7 FCC Rcd 6045 (1992), 8 FCC Rcd 4223 (1993), appeal pending, No. 92-1546 (D.C. Cir.) (AM and FM licenses renewed with reporting conditions where licensee contacted no minority referral sources,

had minority applicants apply for only four of 36 job openings, and failed to evaluate its EEO program); Goodrich Broadcasting, Inc., 7 FCC Rcd 6655, 6656-57 (1992) (AM and FM licenses renewed with reporting conditions where licensee failed to keep any applicant flow data, thereby leaving it unable to determine the referral sources contacted for 29 of 42 job openings, failed to evaluate its EEO program, and appeared to have had no minority applicants in the interview pools for 35 of 38 job openings); Radio Seaway, Inc., 7 FCC Rcd 5965, 5968 (1992) (FM license renewed with reporting conditions where licensee failed to contact outside referral sources for 20 of 31 job openings, and failed to recruit for any job openings prior to the reporting year that preceded the filing of its renewal application).

170. KFUO's EEO program, even disregarding the King's Garden issue, was clearly superior to the programs in the above listed decisions, all of which merited full-term renewals and no forfeitures. Indeed, the Stations' EEO program was quite arguably better than EEO programs that were found to merit unconditional license renewal even after KFUO's License Term had ended and the Commission had narrowed its definition of an adequate EEO program. See Certain Broadcast Stations Serving Communities in the State of Arkansas, 6 FCC Rcd 4938, 4939-40 (1991) (Commission noted that "it is apparent that the licensee in fact engages in significant efforts to recruit and hire minorities" and granted an unconditional license renewal where six of seven Annual Employment Reports filed by licensee were inaccurate, the licensee contacted minority-specific referral

sources for only 21 of 70 job openings (30%), and only 4 of 70 hires (5.7%) were minority in a market with a 17.3% minority labor force). In sum, when judged against this standard, appropriate for the time in which the conduct occurred, a review of the Stations' EEO recruitment and hiring efforts (set forth in paragraphs 56-64, 67-68, and 84-90 herein) clearly demonstrates that the licenses of KFUE(AM) and KFUE-FM should be unconditionally renewed for a full term or, at most, be subject to EEO reporting conditions.

171. That reporting conditions are the greatest sanction that should be considered becomes even more apparent when KFUE's record is compared with the EEO programs of stations that were renewed for a full term but were issued forfeitures. See, e.g., Application of Group Six Communications, Inc., 7 FCC Rcd 1815, 1816 (1992) (FM license renewed for a full term and \$20,000 forfeiture and reporting conditions imposed where licensee "rarely activated its EEO program," reported no minority applicants, interviewees, or hires for any of its 26 job openings, failed to keep records necessary to assess its program, and failed to modify its EEO program until just prior to filing its renewal application); Letter to Kerby Confer, 5 FCC Rcd 579 (1990) (FM license renewed for a full term and \$10,000 forfeiture and reporting conditions imposed where licensee contacted no minority referral sources until the end of the license term, failed to evaluate its EEO program, and had only one minority applicant for eleven job openings despite the fact that 51.1% of the local labor force was African-American); Letter to John P.

Healy, 5 FCC Rcd 3745 (1990) (FM license renewed for a full term and \$10,000 forfeiture and reporting conditions were imposed where licensee used no minority recruitment sources, failed to evaluate its EEO program, and had had no minority applicants despite 32 upper-level job openings); Letter to Pegram Harrison, 4 FCC Rcd 8255 (1989) (AM and FM licenses renewed for a full term and \$18,000 forfeiture and reporting conditions imposed where licensee failed to contact minority recruitment sources for specific job openings, failed to evaluate its EEO program, hired only one minority in filling 53 job openings despite the fact that 10.5% of the local labor force was minority, and had that one minority employee leave after only six weeks).

172. Given the extensive precedent listed above which demonstrates that KFUE's EEO program was far from inadequate, and, in fact, quite substantial, the licenses of KFUE(AM) and KFUE-FM should be unconditionally renewed or, at most, reporting conditions should be imposed upon their renewals. To treat KFUE differently than other licensees were treated for their EEO performance during the 1983-1990 License Term would be unreasonable and a clear violation of the due process standards established in Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

#### **B. NON-DISCRIMINATION ISSUE**

173. Although the HDO did not designate a § 73.2080(a) discrimination issue, the § 73.2080(b) issue was modified by the Presiding Judge to add that issue based on unsupported language

in the HDO to the effect that "substantial and material questions of fact exist [as] to whether the licensee's employment practices are discriminatory in violation of our EEO rule, 47 C.F.R.

§ 73.2080." The Lutheran Church/Missouri Synod, Memorandum Opinion and Order, FCC 94M-191, MM Docket No. 94-10 (March 25, 1994) (emphasis omitted).<sup>54/</sup> Section 73.2080(a) of the Commission's Rules requires that broadcast licensees provide "equal opportunity in employment . . . to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex." 47 C.F.R. § 73.2080(a).

174. There can be no doubt that KFUEO afforded equal employment opportunity limited only to the extent that religion may be legally considered by a religious institution in making certain employment decisions. In terms of racial discrimination, there is not one scintilla of evidence in the hearing record to indicate that any discriminatory act ever occurred, or that anyone ever even made an allegation of racial discrimination regarding KFUEO's employment practices. Despite having access to a mass of employment and payroll documents from the Stations, neither the Mass Media Bureau nor the NAACP submitted a single exhibit indicating that any employee, or applicant for employment at the Stations, had alleged that he or she had been the victim of discrimination. Neither party produced any evidence of any

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<sup>54/</sup> As set forth in KFUEO's Request for Leave to File Appeal filed April 1, 1994, KFUEO maintains that the issue designated by the Commission should not have been modified to include the nondiscrimination issue.



potential applicant who was ever discouraged from applying to the Stations because of his or her race or religion. Similarly, witness after witness testified that they were not aware of any acts of racial discrimination at the Stations or allegations to that effect. As in many past cases where allegations of discrimination have been made but investigation reveals no complaints or other evidence of discrimination, the issue must be decided in favor of the licensee.<sup>55/</sup>

175. Given the complete lack of evidence that any acts of discrimination ever occurred at KFUC, it is a mystery as to why the HDO included language even suggesting that discrimination might be an issue. It appears that the HDO's language originated with some statements drafted by the Church's communications counsel regarding the Church's classical music employment criteria and asking that the Commission take the criteria into account when analyzing KFUC's employment statistics. While such statements might ordinarily lead to an inquiry as to the bona

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<sup>55/</sup> See WXBM-FM, Inc., FCC 91D-63 (ALJ Dec. 16, 1991) (where Mass Media Bureau did not locate any minority who was allegedly denied employment or was discouraged from completing an employment application by the licensee, no discrimination found); Applications of Certain Television Stations Serving Communities in the State of California, 6 FCC Rcd 2340, 2343 (1991), recon. denied, 8 FCC Rcd 417 (1993) (petitioner did not support allegation of religious discrimination where it failed to identify anyone adversely affected by station's employment practices and no EEO complaints were filed during license term); CBS, Inc., 88 F.C.C.2d 649, 668-69 (1981) (where petitioner alleged that women were not given managerial or technical positions at station but failed to identify any qualified women who sought but did not receive such a position, no substantial and material question of fact concerning discrimination was raised).